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It's 2019. Is it time to disclose climate-related information?

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Across the globe, public companies face mounting pressure to make climate-related disclosures in their annual corporate reports and through other forums. Investors, regulators, shareholders and limited partners are increasingly demanding that entities both disclose publicly how they consider climate change risks and opportunities in decision-making, and report their greenhouse gas emission profiles and climate mitigation activities.

U.S. FEDERAL DISCLOSURE REQUIREMENTS

Global leaders across industrial sectors are also self-organizing in the absence of U.S. regulatory action on climate-related disclosures. Driving these trends are disclosure requirements from foreign jurisdictions and from financial institutions that provide access to capital, as well as public pressure from both shareholders and customers for companies to make and honor voluntary, high-level, climate-related commitments.

As corporate disclosure deadlines approach in early 2019, it is important for public companies to understand potential disclosure obligations, recognized reporting frameworks, and the risks and benefits of voluntary disclosure.

A number of non-U.S. jurisdictions mandate some form of climate-related disclosures, and several others are actively considering such requirements. In the United States, state and local governments are leading the way, and the investment community is driving the increasing use of voluntary disclosures.

In 2010, the U.S. Securities and Exchange Commission issued commission-level guidance specifically addressing public reporting companies' "existing disclosure requirements as they relate to climate change matters."[1]

The guidance reiterated the basic principle that public reporting companies must disclose in their SEC filings all "material information," referring to the traditional definition for materiality in the federal securities law context.[2] Specifically, material information is that which "a reasonable investor would consider … important in deciding how to vote or make an investment decision."[3]

Thus, while federal securities laws and regulations do not explicitly mandate climate-related disclosures, such disclosures could be necessary in certain situations for certain issuers. For example, they may be required if the physical impacts of climate change create risk or affect a company's operations and results.[4]

Although SEC enforcement is possible, companies that do not make adequate climate-related disclosures are more likely to face reputational consequences than enforcement.[5]

Federal securities laws and regulations regarding climate-related disclosures are not likely to change during the current administration. But investor groups and legislators — such as presidential hopeful U.S. Sen. Elizabeth Warren — have pursued legislation aimed at climate-related disclosure requirements, which means that further developments may be on the horizon.[6]

STATE, LOCAL AND PRIVATE-SECTOR ACTIONS

In the absence of federal regulatory action, states including California and New York are leading the way to require climate disclosure through actions such as requiring pension funds to report climate information and using state police powers to investigate financial records.[7]

Specifically, material information is that which "a reasonable investor would consider … important in deciding how to vote or make an investment decision."

Furthermore, the majority of Fortune 500 companies have recently chosen to make voluntary climate-related disclosures of data, including data related to greenhouse gas emissions.[8] Many of these companies, including energy giants Dominion and Devon, have even agreed to produce reports on climate-related financial risks.[9]

And, as described in more detail below, many large companies have committed to increasing transparency in reporting climate risks and opportunities as part of private-sector contributions to international processes, such as the United Nations climate change negotiations.

The trend toward increased disclosure is likely to continue, as further evidenced by pressures from within the investment community. These pressures are exemplified by a January 2018 "Letter to CEOs" from Larry Fink, the chairman and CEO of BlackRock Inc.[10]

In the letter, Fink described the fiduciary responsibility that BlackRock undertakes as including global stewardship concerns, such as addressing climate change.[11] Climate disclosures thus may play a key role in investment decision-making by BlackRock and other institutional investors going forward.

DISCLOSURE REQUIREMENTS IN FOREIGN JURISDICTIONS

Regulatory bodies in several countries explicitly require climate-related disclosures as part of public company reporting.

For example, France in 2015 enacted Article 173-VI of the Energy Transition for Green Growth law, which requires asset management companies and some institutional investors to disclose their environmental, social, and governance policies; a list and proportion of investments for which ESG criteria is taken into account; and the methodology and results of ESG assessments.[12]

The United Kingdom, meanwhile, has required companies to report global greenhouse gas emissions in their annual reports since 2013.[13]

In 2018, all companies in the European Union with more than 500 employees became subject to a requirement that they publish reports on their policies related to environmental protection, including the ways they operate and manage environmental challenges, as part of the Non-Financial Reporting Directive.[14]

In other parts of the world, regulators are considering mandating some form of climate reporting.[15] For example, the Canadian Securities Administrators indicated in a 2018 report that they are considering new disclosure requirements regarding climate change-related risks, including the disclosure of Scope 1 and Scope 2 greenhouse gas emissions.[16]

Similarly, the Australian Securities and Investments Commission recently noted that Australian companies engage in "fragmented disclosure practices" that often fail to provide useful information, signaling that Australia may consider mandatory climate-related reporting in the future.[17]

Additionally, China's Green Finance Task Force made recommendations in 2015 to establish a "green finance system" that would impose mandatory environmental disclosure requirements on investment institutions and businesses.[18] By 2020, seven Chinese government agencies reportedly plan to require all publicly listed Chinese companies to disclose information related to environmental risks.[19]

GLOBAL ENTITIES DRIVING INTERNATIONAL COMMITMENTS

Many companies have also made significant public commitments to increase their efforts to improve climate-related financial reporting. These commitments are associated in part with ongoing multilateral processes, such as private-sector efforts to support implementation of the Paris Agreement of the United Nations Framework Convention on Climate Change negotiations and the Sustainable Development Goals.[20]

Cities and municipalities are also working to support the Paris process, including by endorsing a unified framework for the disclosure of climate-related financial risks.[21]

Furthermore, the International Finance Corporation evaluates climate risk as part of all of its investments, as do many private financial institutions.[22]

In addition, many stock exchanges throughout the world have issued guidelines to encourage and standardize ESG reporting, including reporting on climate change risks.

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For example, the London Stock Exchange considers climate change to be a primary component of environmental disclosures, with a particular emphasis on how companies can respond to climate risks, demonstrate future viability and resilience, and achieve cost savings through efficiencies and "green revenue opportunities."[23]

To date, stock exchanges in over 40 countries spanning six continents have published guidance on ESG reporting, and much of this guidance addresses the need for climate-related disclosures.[24]

Despite the number of jurisdictions that require or encourage climate-related disclosures, there is no singular, uniform reporting framework. There are, however, several prevalent ones.

Task force on climate-related financial disclosures

In 2015, the Financial Stability Board — an international financial advisory body and outgrowth of the 2009 G20 London summit — formed the Task Force on Climate-related Financial Disclosures.

In its 2017 report, the TCFD published a framework designed to be implemented in companies' existing financial filings "to solicit decision-useful, forward-looking information on financial impacts" with a "strong focus on risks and opportunities related to [the] transition to [a] lower-carbon economy."[25]

Importantly, this framework provides guidance to both financial groups — such as banks, insurance companies, asset owners and asset managers — and non-financial companies — including those in the energy, transportation, materials, building, agriculture, food and forest product industries.[26]

Over 500 companies — including Bank of America, JPMorgan Chase, Rio Tinto and Schneider Electric — have reportedly endorsed the TCFD recommendations, which many global leaders at the recent United Nations climate negotiations in Katowice committed to implementing in their respective countries by 2020.[27]

Sustainability Accounting Standards Board

In a manner similar to that of the TCFD, the Sustainability Accounting Standards Board has developed a guide to help public companies report climate risks in financial filings. The SASB standards aim to help companies determine whether a given climate risk is "material" — that is, whether the risk "affects the company's financial condition or operating performance" and thus must be reported on filings such as SEC Forms 10-K and 20-F.[28]

CDP

CDP, formerly known as the Carbon Disclosure Project, is a nonprofit that operates a global disclosure system for measuring and managing environmental impacts.

Collecting annual, self-reported environmental information from companies and government entities, CDP analyzes and redistributes climate-related disclosure data to a network of investors and purchasers with over $100 trillion in assets.[29]

Through CDP's disclosure framework, companies can report a wide range of climate-related information related to corporate governance, risk and opportunity management, business strategy, targets and performance, emissions data and energy use.

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EU reporting guidelines

While the EU non-financial reporting rules do not mandate the use of any particular framework, the EU has published its own nonbinding guidelines, including those related to environmental and climate issues.[30] The EU guidelines draw on existing frameworks across a variety of sectors, such as the TCFD framework.[31]

With respect to climate-related risks, companies following the EU guidelines are expected to disclose the actual and potential impacts of their operations on the environment, as well as to describe how current and foreseeable matters may affect a company's development, performance or market position.[32]

CONCLUSION

As investors, regulators and shareholders pay closer attention to public companies' consideration of and responses to climate change, it is critical that companies understand climate-related disclosure obligations and options. If reporting is obligated or opted-for, companies should choose a recognized disclosure framework that meets their operational, reputational and financial needs.

The many differing frameworks can at times conflict with one another and may not directly align with legal requirements. Therefore, approaching climate-related disclosures and choosing the appropriate framework entails weighing the many risks and benefits of disclosure, particularly in the context of voluntary disclosures.

NOTES

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2 75 Fed. Reg. at 6293.

3 *Id.*

4 *Id.* at 6296-97.

5 GAO-18-188, Climate-Related Risk: SEC Has Taken Steps to Clarify Disclosure Requirements, U.S. Government Accountability Office (Feb. 20, 2018) ("[I]f SEC reviewers find a material inadequacy in a company's disclosures, the reviewers may refer the potential violations to the Division of Enforcement for investigation … [and the] SEC may file an action in federal district court or institute an administrative proceeding."), https://bit.ly/2RjfYE1.

6 Climate Risk Disclosure Act of 2018, S. 3481, 115th Cong. (2018) (seeking to amend the Securities Exchange Act of 1934 to "require issuers to disclose certain activities relating to climate change," including greenhouse gas emissions, fossil fuel-related assets owned or managed, valuations under various climate change scenarios, and climate-related risk management strategies), https://bit.ly/2UhiVqy, https://bit.ly/2G629Xx; Letter from to Cynthia A. Williams et al., to Brent J. Fields, Secretary, Securities and Exchange Commission (Oct. 1, 2018) (petitioning SEC to initiate rulemaking process to require environmental and other additional disclosures for public reporting companies), https://bit.ly/2RmOv4v.

7 Public Employees' Retirement Fund and Teachers' Retirement Fund: investments: climate-related financial risk, SB-964 (Sept. 23, 2018) *available at* https://bit.ly/2Wp7XB8; Robert Repetto, It's Time the SEC Enforced its Climate Disclosure Rules, Mar. 23, 2016 (noting then-New York Attorney General Andrew Cuomo's lawsuits against electric utilities in New York concerning allegations that the companies misled investors through inadequate climate disclosures).

8 Power Forward 3.0: How the largest U.S. companies are capturing business value while addressing climate change (April 2017), *available at* https://bit.ly/2CSzLoA.

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[12] Decree Implementing Article 173-VI of the French Law for the Energy Transition. Challenges and first Recommendations (October 2015), *available at* https://bit.ly/2WnlFoc.

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[14] EU Directive 2014/95/EU.

[15] The growing role of ESG investing in portfolio management, Bloomberg Professional Services (June 8, 2017), *available at* https://bloom.bg/2sNRrgA

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[17] Climate risk disclosure by Australia's listed companies, Australian Securities & Investments Commission (September 2018), *available at* https://bit.ly/2Tizr9T.

[18] Final Report of the Green Finance Task Force (2015), *available at* https://bit.ly/2TiRjkV.

[19] *Id.*

[20] 288 Investors With More Than $26 Trillion in Assets Call on World Governments to Scale Up Climate Action to Achieve the Goals of the Paris Agreement (June 4, 2018) *available at* https://bit.ly/2G4i8W9.

[21] Press Release, C-40 (July 5, 2017) *available at* https://bit.ly/2HAMXUJ.

[22] "Account for Climate Risk," International Financial Corp., *available at* https://bit.ly/2G3lcAS.

[23] Your guide to ESG reporting, London Stock Exchange Group (January 2018), *available at* https://bit.ly/2FK4Q1s.

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[25] Recommendations of the Task Force on Climate-related Financial Disclosures, Task
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[26] *Id.* at 15-16.

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[30] *See generally* 2017/c 215/01, Guidelines on non-financial reporting, Official Journal of the European Union (2017), *available at* https://bit.ly/2FSLd7H.

[31] *Id.* at 4.

[32] *Id.* at 4.6(a).

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